No. 11268.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN and BERNARD STEIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

PAGE

STATUTES

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Statement of Facts.

Appellee deems it advisable to make a statement of facts before proceeding to answer Appellants' Opening Brief.

The indictment, in one count, charged appellants Fred Stein and Bernard Stein, and one John L. Fisher who did not appeal, with violating 21 U. S. C., Section 174.

The date charged was "on or about September 14, 1945." The narcotics consisted of approximately fifty-six ounces of prepared smoking opium [R. 105-106].

Fred Stein and Marguerite Brander, his purported wife, had lived at 3930 Dixie Canyon Road since January of 1945, until their separation of September 11, 1945, Marguerite Brander going by the name of Mrs. Fred Stein [R. 115-116].

The eight cans of smoking opium were seized on this property, in the possession of Bernard Stein and John Fisher, on the night of September 14, 1945 [R. 275]. The eight cans of opium were wrapped in three separate packages.

Title to the property at 3930 Dixie Canyon Road, San Fernando Valley, had been taken in joint tenancy by the witness, Mrs. Marguerite Brander, as Mrs. Stein, and Fred Stein [R. 99 and 367]. Marguerite Brander and Fred Stein parted after their final quarrel, which was September 10 or 11, 1945 [R. 116].

Prior to the final quarrel between Mrs. Brander and Fred Stein and during the month of May, 1945, Mrs. Brander and Fred Stein had had a previous quarrel. While apart and on May 5, 1945, she had sent to Fred Stein a telegram [Defendants' Exhibit "C", R. 228]. Shortly after this date, they "talked it over and made up and went back together" [R. 261]. Mrs. Brander stated she had never received any money from Fred Stein [R. 262]. Marguerite Brander further testified that she at no time made any demand of Bernard Stein or Fred Stein for $5000. Brander stated that about six weeks before she finally left (that is, about six weeks before September 11, 1945), and while she was sitting in Fred Stein's automobile in the metropolitan area of Los Angeles, Fred had handed her a sum of money, and Fred stated: "It is approximately $30,000 and you take care of it." Fred then left the car, but later returned, and she then gave this money back to him [R. 364-365].

About three months prior to the final quarrel of September 11, 1945, the witness Brander had seen Fred Stein with a can similar to Government's Exhibit No. 1.

This was in the kitchen of their residence. Fred was taking some of the "black substance" out of the can, put it in a pan, put it on the stove and added water to it [R. 116-117 and 121]. Witness Brander stated the substance of the can she saw Fred Stein so preparing was a "black substance" [R. 117] similar in appearance to the substance from Government's Exhibit No. 1 [R. 119]; that he put it in a pan, added water and boiled it a short time, then put it into a bottle and put it in the ice box [R. 121]. Fred later told the witness such substance was opium and that he (Fred Stein) "had been on it for some time and that he couldn't quit" [R. 122]. Fred Stein also said if I (Mrs. Brander) didn't like the way he was living, the house had more than one exit and I could leave; that she pleaded with him to quit and he stated that she would never see any more of it around the house [R. 123].

Mrs. Brander stated she had seen Fred Stein pour this boiled substance from the bottle into a teaspoon and take it in the morning and at night, and that he did that about every day after the first episode that she observed [R. 126]. Brander stated that while Fred was boiling this black substance—"it had a very strong odor, a sweet, strong odor. I don't know how to explain it. I never smelled anything like it. It was different from anything I ever came in contact with before" [R. 127]. That upon occasions when she had worked in the garden and had first seen him boiling the substance, she had smelled this odor while in the garden [R. 128].

That upon another occasion before she finally left, she saw some pictures in a newspaper where some cans were displayed, which reflected that people were arrested for dealing in opium, and that in the picture the cans were

spread out on a table [R. 129]. That she had asked Fred what was in the cans and what it looked like, and he told her that it was a thick black substance. "He said it was smoking opium; it could also be taken" [R. 131]. After she had seen this picture she saw similar cans in their kitchen [R. 132]. That when she asked Fred Stein what it was, he told her—it was dope and that he was sorry she had found it out, but that he had been taking it for some time [R. 132].

That within the week before she left Fred Stein he continued to take the substance from a bottle about every day, or twice a day [R. 135].

That about September 8, 1945, she went into their garage, adjacent to their house, and found a box covered with leaves, which box was heavy. That upon emptying out the leaves, she found eight cans [R. 136-137]. That the cans were all closed but that the substance in them had leaked out and the object was messy. They were wrapped in newspapers and they were sticking together [R. 138]. Witness stated that the cans she found in the garage were similar to Exhibit No. 1 [R. 138-139].

Mrs. Brander first left these cans in the garage where she found them [R. 140-141]. A few days later she had a conversation with Fred Stein in the kitchen, where he took some of this "stuff," as he refers to it [R. 142]. That Fred Stein had also referred to "it" as "stuff" or "junk" [R. 142]. That on this day, either the 10th or 11th of September, when she saw him taking some of "this stuff," Fred Stein stated—"he had been on it too long and he wasn't going to get off now" [R. 145]. They had a quarrel and she left the house. A little while later she saw Fred Stein drive away, but first he threw some

things in the car that appeared to be women's clothing [R. 147-148]. That there was a note left on the door.

Mrs. Brander stated that the day she left (September 11, 1945), the day of the final quarrel, she put the eight cans in three different sacks and put them in different places on the premises [R. 151]. She made three packages of the eight cans [R. 152]. One package was placed behind the house under a little tree, the other in the garage in an old rug, the other one close to the incinerator [R. 152].

The concealment of the cans by the witness Brander did *not* take place three days after the final quarrel, as is stated by appellants on page 4 of their opening brief. This fact is additionally supported by the understanding of appellant Fred Stein's counsel, as reflected in his cross-examination of witness Brander [R. 240]:

> "Q. By Mr. Lavine: As a matter of fact, you went down to the police department immediately after you saw Mr. Stein drive down the street, is that correct? A. Yes, sir.
>
> Q. And at that time you didn't tell the police officers anything about any narcotics that you had hidden on the premises, did you? A. No, sir.
>
> Q. You didn't tell them that you had secreted eight cans in three different places on those premises, did you? A. No, sir."

Mrs. Brander went to the Police Department and returned and entered the house and ascertained that certain of her clothes had been removed. She then had a 'phone conversation with Fred Stein. The substance of the conversation was as follows [R. 155-156]:

> "The Witness: I asked him what he did with my clothes and why he took them and he said he

took them because I took his stuff and I said, 'How do you know I took anything of yours?' and he said, 'Well, it was missing.' And he said he knew that I took it, so he says, 'You won't get your clothes until you give me my stuff.' He said, 'The people that have your clothes, the stuff belongs to them, * * *."

Brander stated she had other telephone conversations with Fred Stein and that Fred told her he was leaving her clothes in the hands of his brother Barney (Bernard Stein), and that she was to meet Barney and tell him where "—the 'stuff' is, or show him, and when he gets that, then he will give you your clothes" [R. 159].

Mrs. Brander testified to several telephone conversations thereafter had, both with Bernard Stein and John Fisher, a codefendant but not an appellant.

Bernard Stein is also frequently referred to as "Barney," John Fisher as "Johnnie," Fred Stein as "Freddie." Marguerite Brander was also called "Margo."

On one occasion, about September 13, 1945, during a telephone conversation, Mrs. Brander asked Bernard Stein for her clothes, to which Bernard Stein stated that she couldn't get the return of her clothes until he could return the "stuff" to the people to whom he stated it belonged [R. 163]. A similar such conversation was had with the codefendant Fisher [R. 169].

Witness Brander stated that on September 14, 1945 (the date Bernard Stein and John Fisher were arrested), the hour of about 7:30 p. m. was the first time she got in touch with Narcotic Agent Koehn, and later that evening was the first time she saw Narcotic Agent Davis [R.

168, 156]. Before talking to the Narcotic Agent Koehn, she had talked to Barney Stein and had agreed to meet Barney at the Dixie Canyon place. Bernard had said he would bring her clothes and she had told him she would show him where his "stuff" was [R. 168].

Mrs. Brander had neither seen nor talked to either Narcotic Agent until the night of September 14, 1945 [R. 168, 265].

Marguerite Brander, Narcotic Agent Koehn and his wife, on the evening of September 14, drove over to the Dixie Canyon residence. They were met there by Agent Davis. Brander showed Agent Davis where the three packages were [R. 172, 51]. Agent Davis concealed himself in the yard near the incinerator, awaiting the arrival of Bernard Stein and John Fisher [R. 50]. Agent Koehn had parked his car in the driveway of the Stein residence [R. 270].

Later that evening, Bernard Stein and John Fisher drove up to the Dixie Canyon property in John Fisher's car [R. 173]. They were introduced to Agent Koehn and his wife, Marguerite Brander introducing such persons as Mr. and Mrs. Anderson, friends of hers [R. 173].

Mrs. Brander stepped aside and talked to Barney and Johnnie, and was told by Johnnie in the presence of Barney that she, Margo, was to stay with Johnnie "—and give Barney the 'stuff,' as he is supposed to take it to this address to the people it belongs to, they are to open it and examine it and see if it has been molested in any way, and then he (Barney) will bring your clothes back to you" [R. 174].

Marguerite Brander then took Bernard Stein to the three places where the packages were concealed. Bernard picked each one up, "—smelled of it and pressed it," after which he stated, "this is all the eight cans" [R. 176]. Agent Davis, from his concealed place, as a flashlight was played upon them, saw Bernard pick up two of the objects [R. 51].

Barney carried all the packages but when he got near the light he dropped them [R. 176]. Barney explained his reason for dropping the packages, in that he was not going to take them in front of "these people" [R. 177]. A conversation ensued between Barney, Brander and Johnnie. Barney overcame his fear; he and John Fisher returned and picked up the packages. They then returned toward the car and shortly after were arrested by the agents, Barney being possessed of one package (of narcotics); Fisher, two packages (of narcotics) [R. 54, 275].

Agent Davis stated that he had no agreement with Marquerite Brander but had agreed with Agent Koehn that as soon as the two men had taken possession of the opium they would be placed under arrest [R. 76-77].

Government's Exhibit "4" (a small bottle containing a liquid), the chemist stated was a solution of opium containing yen she [R. 102]. This bottle and contents had been found by the witness Brander on September 15 in the Stein residence, in the kitchen cabinet [R. 193 to 196].

Agent Koehn stated the first time he saw Mrs. Brander was the night of the arrest, September 14, 1945. He saw her because he had received a call from her at the hour of about 6:00 p. m. that day [R. 265]. Fisher and

Bernard Stein drove up to the Dixie Canyon property about 10:30 the night of September 14 [R. 271].

Bernard Stein admitted having several telephone conversations with Mrs. Brander on and after September 12, 1945, with regard to her clothes and "articles" belonging to Fred Stein [R. 295]. He stated she had tried to get $5000 [R. 297]. Bernard stated that the night of the arrest he parked his car away from the house because Mrs. Brander's clothes were in it, and drove up in Fisher's car. He did this because "—a wee bit suspicious she wasn't going to act in good faith, and I parked my car half a mile from Dixie Canyon and rode up to the house with Johnnie in his car" [R. 299, 309]. Bernard Stein admitted going with Brander and picking up the packages near a tree, near the incinerator, and in the garage [R. 301-302, 315].

Bernard Stein stated that he was going to return Mrs. Brander's clothes when he received back his brother Fred's articles which he described as—"an Elk's Pin," "Wristwatch," "Drapes," "Floor Radio," "Dishes," "Radio," a pair of "Binoculars," and "Whiskey" [R. 320]. Upon arriving at the Dixie Canyon residence, Bernard first went with Mrs. Brander and with the aid of a flashlight picked up three packages, two concealed in the yard and one in the garage. Bernard "smelled" of each package [R. 176].

At the trial Fred Stein was represented by Attorney Morris Lavine. Attorney Alfred F. MacDonald then represented Bernard Stein and John Fisher.

ARGUMENT.

I.

It Is Well Settled That the Charge to the Jury Must Be Considered as a Whole.

We commence our argument with this well settled principle, because appellants have devoted a great portion of their brief to either (a) the contention of error from the refusal to give certain proposed instructions, or (b) error in the instructions given. Appellee believes, that as this brief develops, it will appear that when the instructions are viewed in their entirety, no prejudicial error was made.

That the instructions must be considered in their entirety is well established.

To this effect:

United States v. Sorcey (C. C. A. 7th), 151 F. (2d) 899.

On page 901 appears the following:

> "There is no requirement that any specifically framed charge be given if the general charge includes fair, comprehensive instructions upon the subject-matter involved, and in framing a charge upon the elements bearing upon credibility of witnesses, the court is not to be bound to a hard and fast formula as to each and every phase of his charge."

Also, see:

Taylor v. United States (C. C. A. 9th), 142 F. (2d) 808, at p. 817; cert. den. 323 U. S. 723.

To the same effect:

Hargreaves v. United States (C. C. A. 9th), 75 F. (2d) 68, at p. 73; cert. den. 295 U. S. 759.

"It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. Colt v. U. S., 190 F. 305, 308 (C. C. A. 8); Michael v. U. S., 7 F. (2d) 865, 866 (C. C. A. 7)."

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. United States (C. C. A. 5th), 135 F. (2d) 353, at p. 355; cert. den. 320 U. S. 740.

"When we turn to the refused requests to charge, we must keep in mind that they are not to be considered abstractly or in *vacuo* as though the court had given no charge at all. They must be considered in their relation to the trial as a whole and especially in the light of the very full and fair general charge given, to which no exception was taken. In short, the refusal as to any of them may be regarded as reversible error if, but only if (1) it is in itself a correct charge; (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation."

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. United States (C. C. A. 9th), 132 F. (2d) 538; cert. den. 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction, to this effect:

Roubay v. United States (C. C. A. 9th), 115 F. (2d) 49.

A *narcotic* case of this Circuit which has been frequently quoted in other opinions and which discusses these general principles pertaining to sufficiency of instructions and the refusal to give certain specifically requested ones as not constituting error, is that of

Mullaney v. United States (C. C. A. 9th), 82 F. (2d) 638, at pp. 642 and 643.

We feel that the above authorities and the ones later to be referred to, when dealing with the specific subject matters appellants now complain of, such as entrapment, accomplice, personal possession of the narcotics, the date charged that the offense was committed, etc., clearly indicate that no reversible error was committed. This contention is especialiy true in view of the strong proof of the guilt of the appellants, the admissions made, and the settled rule that credibility is a matter solely for the jury's determination.

II.

The Issue of Entrapment Submitted to the Jury and Decided Adverse to the Appellants and the Instruction of the Court Upon This Principle of Law Was Ample, Fair and in Accordance With Law.

Commencing on page 9 of appellants' opening brief, also on page 27, on page 32, and again on page 36, various contentions with respect to the issue of ENTRAPMENT are presented. Again on page 41 of appellants' brief, they argue this same point with respect to Instructions "12" and "13," that were refused.

In this brief we shall endeavor to answer all of these contentions under this heading.

We do not believe that the evidence indicates that as a matter of law entrapment existed. Fred Stein could not contend that he was entrapped; he was not present when Bernard Stein and John Fisher were arrested on the night of September 14, 1945. The evidence is abundant to the effect that Bernard Stein and the codefendant (but not an appellant) John Fisher prearranged with Marguerite Brander to come out to the Dixie Canyon home and secure the "stuff," promising to give in return the clothes belonging to Marguerite Brander [R. 168 and 174].

The Narcotic Agents had not planted the opium; they were not advised until the evening of September 14, 1945, that any opium was on the premises. The Narcotic Agents had had no conversations with any of the defendants, or appellants here. The agents did not "entice," "persuade," or "induce" the appellants to engage in the commission of a crime just for the purpose of apprehend-

ing them. The action of the agents was watchful waiting. The acts of the Narcotic Agents were completely in accord with the language of the famous case of *Sorrells v. United States,* 287 U. S. 435, the often quoted case on the subject matter of *entrapment.*

We quote, from page 441:

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." (Citing many authorities.)

We have no argument with the contention urged by appellants that Mrs. Brander, according to her own statements, was a woman of low character and we agree that "birds of a feather flock together." We also recognize the scorn of a woman who has been frustrated. These contentions were very appropriate to have been urged before a jury; however, her credibility was likewise a matter for the jury to decide.

Rarely in a case of this character, or one involving the possession of illicit narcotics, can the Government entirely prove its case by people of fine repute. With the exception of agents, seldom do people of good reputation comingle with those handling narcotics. Of necessity, and as most of the reported cases will reveal, a major portion of the Government's testimony comes from the mouths of persons who are informers or from persons who have been tainted by some form of unlawful association.

A. Discussion of 21 U. S. C. A., Sec. 173.

Appellants argue that in accordance with Title 21, Section 173 of U. S. C., once the Narcotic Agents became aware that narcotics had been concealed it was their immediate duty to seize the same. Such argument falls by its own weigh, and also fails to recognize the purpose of this section. This section is one giving summary power for the immediate seizure of narcotics and drugs which had been imported or brought into the United States contrary to law, thereby avoiding the necessity of instituting forfeiture proceedings. This section does not, nor can it by implication be construed to mean that once a Narcotic Agent becomes aware of a cache of narcotics, that he is unable to wait and apprehend the person who may return to secure this illicit product. If such contention were sound, indeed would Narcotic Agents' hands be seriously shackled. We find no authority to support this contention. Appellants have cited none.

B. The Law of Entrapment More Fully Discussed.

As stated, the leading case on entrapment is:

Sorrells v. United States, 287 U. S. 435.

A rereading of the *Sorrells* case indicates the facts in that case to be entirely different from this case. It was a prohibition case. Sorrells was lured by the agent to commit a crime of which he was otherwise innocent. This was by repeated and persistent solicitations, by taking advantage of the sentiment aroused by reminiscences of their experience as companions in arms in the World War. See page 441 of *Sorrells* opinion.

The *Sorrells* case announces the well settled rule, as heretofore quoted, that artifice may be employed to catch those engaged in criminal enterprise and that the Government may afford opportunities which of itself will not defeat the prosecution.

The *Sorrells* case concludes by stating that the defense of entrapment was available and that the trial court erred by holding as a matter of law that there was no entrapment and in refusing to submit the issue of entrapment to the jury.

In the present case the issue of entrapment was submitted to the jury after full and complete instruction. The instruction on entrapment in the instant case consisted of two full pages of this printed record. See [R. 382 to 384]. A reading of the instruction given will illustrate that the issue of entrapment was fairly presented and was a correct exposition of the law on this subject.

The doctrine with respect to entrapment does not apply to a private citizen who is not an officer of the law. Such is the rule announced in the following case, involving *narcotics.*

> *Jindra v. United States* (C. C. A. 5th), 69 F. (2d) 429, at p. 431; cert. den. 292 U. S. 651.
>
> "Hammer testified positively that when he approached Jindra about narcotics he was not acting for the government officers nor under their instructions. Jindra's counsel contended that the circumstances showed the contrary, and justified a charge on so-called entrapment. The court charged: 'The defense of entrapment has been urged in this case. You are charged that while officers of the law have a right

and it is their duty to test out persons that they have reasonable grounds to believe are engaged in the violation of law, but no officer of the law has a right to go out and entice, persuade or induce a person who is otherwise innocent to engage in the commission of a crime just for the purpose of apprehending him and convicting him. It would be intolerable if officers of the law were permitted to engage in any such conduct, *but the Court is not aware of any rule of law which would extend that doctrine to a private citizen who is not an officer of the law.*' Exception was taken because 'the testimony reveals an agency for the Government.' The agency was not, however, a proven fact. The charge was abstractly correct." (Italics supplied.)

This Circuit has held, in a *narcotic* case:

Louie Hung v. United States (C. C. A. 9th), 111 F. (2d) 325.

When an officer does no more than furnish the appellant the opportunity of committing the offense, entrapment does not exist.

In the following cited *narcotic* case where the agent made several trips to the doctor's office with a drug addict or a decoy, the court pointed out that entrapment only exists when the Government's agents induce or originate the criminal intent of a defendant, and that there is none when the criminal intent is already present and the agent merely affords opportunity for the commission of the crime. To such effect see:

United States v. Abdallah, 149 F. (2d) 219; cert. den. 326 U. S. 724.

In the above case the court approved an instruction similar to the one given in the instant case and pointed

out that the jury's verdict negatived the existence of the defense of entrapment.

For additional *narcotic* cases agreeing with the principles above announced and in conformity with the adequate instructions given by the trial court in the instant case, see:

United States v. Lindenfeld (C. C. A. 2d), 142 F. (2d) 829, at p. 831; cert. den. 323 U. S. 761;

Ratigan v. United States (C. C. A. 9th), 88 F. (2d) 919, at p. 922; cert. den. 301 U. S. 705; reh. den. 302 U. S. 774.

Also see:

Mitchell v. United States (C. C. A. 10th), 143 F. (2d) 953, at p. 957.

"There is no confusion as to the law of legal or illegal entrapment. The principle is well stated in C. M. Spring Drug Co., et al. v. United States, 8 Cir., 12 F. 2d 852, 856, where the court said: 'It is well settled by the decisions of the Supreme Court of the United States, we think now universally followed in the several circuits, that, where the government, through its agents, has reasonable cause to believe that the law is being violated by the defendant, they may legally entrap the defendant by decoy letters or by pretended purchases.'"

To the same effect:

Farber v. United States (C. C. A. 9th), 114 F. (2d) 5, at p. 10; cert. den. 311 U. S. 706.

"It is claimed that appellant was entrapped and therefore the judgment should be reversed. This defense is applicable only where the officers instigate the crime charged and committed, but does not apply,

as here, where the officers discover the criminal in the doing of the crime which has already been instigated or already commenced or planned. See the leading case of Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249. To allow the defense of entrapment here would be to bar conviction wherever the Secret Service allowed the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime. The defense of entrapment is not here sustained."

C. Discussion of the Evidence With Respect to the Contention of Entrapment, and Specific Evidence of the Guilty Knowledge of the Appellants.

From the foregoing, first from a factual point of view, the officers had nothing to do with the concealing of the opium that the witness Brander had, on or about September 8, 1945, found in the garage adjacent to the premises where she and Fred Stein were living, which drug she concealed in three different places on the day of their final quarrel, namely, September 11, 1945.

The Narcotic Agents were first advised on the evening of September 14, that narcotics had been so concealed and, being alert, they went to the place of its concealment and waited until its possesssion was taken by Bernard Stein and John Fisher, and thereafter caused their arrest. The record is replete with admissions made by Bernard Stein, showing guilty knowledge. The following is but a portion of the evidence in illustration of his guilty knowledge: We refer to the telephone conversation he had with Marguerite Brander, in one of which he stated that Mrs. Brander couldn't receive the return of her clothes until he could return the

"stuff" to the people to whom he stated it belonged [R. 163]. He, Bernard Stein, had again talked to Marguerite Brander over the telephone and had agreed to meet her at the Dixie Canyon place, Bernard stating that he would bring her clothes and she had told him she would show him where his "stuff" was [R. 168]. When he arrived at the Dixie Canyon residence on the night in question, in the presence of the codefendant Fisher, Brander was told to give Bernard Stein the "stuff," it was to be taken to the people to whom it supposedly belonged, they were to open it and examine it and see if it had been molested and if not then he, Bernard Stein, would bring the clothes back to Mrs. Brander [R. 174]. When Bernard Stein accompanied Mrs. Brander to the three places where the packages had been placed, a flashlight was used. He picked each package up, "—smelled of it and pressed it," after which he stated: "This is all of the eight cans" [R. 176]. He also showed guilty knowledge by dropping the packages when he was returning toward the place where Agent Koehn had parked his car [R. 177].

Bernard Stein tried to excuse his acts by stating he only intended to go after articles that Mrs. Brander had which belonged to his brother, and that upon their return he intended to give her her clothes although he did not then even have her clothes with him; they were parked in his car over half a mile away. Despite this shallow explanation he was willing to go to the three places where the packages were hidden [R. 315], although the articles he

tried to explain that he intended to return to his brother were such things as an Elk's Pin, Wrist Watch, Drapes, Floor Radio, Dishes, etc. [R. 320]. It is hard to see how he expected to find such articles concealed about the yard.

The evidence with respect to Fred Stein's guilty knowledge and possession is abundantly established by the testimony of Marguerite Brander, both with respect to his use of the substance of a similar character to that found in the eight opium cans, his boiling the substance in water, his telling her (Mrs. Brander) that it was "dope" [R. 132], his admission that he took it [R. 122], his use of it [R. 142], his reference to the opium as "stuff," or "junk" [R. 142], and his admission that he was taking opium [R. 145].

Fred Stein's guilty knowledge is further inferentially supported by his sudden leaving on September 11, 1945. The only proper inference that can be drawn is that he had ascertained that his eight cans of opium were missing from the garage, he was suspicious and fearful, his sudden departure was somewhat in the nature of flight. He then caused Mrs. Brander to deal through his brother, Bernard Stein, and John Fisher, hoping to get the return of his opium in exchange for the clothing of Marguerite Brander which he had taken away on September 11.

From the foregoing it appears that the court's instruction on the subject of *entrapment,* as is reflected [R. 382 to 384], was proper and adequate and that it is of no moment that a private person motivate the assistance of officers if in fact entrapment as the authorities state did not exist.

III.

The Evidence Was Clearly Sufficient to Justify the Verdict, and the Verdict Is Supported by the Law and the Evidence.

On page 15 of their brief, appellants argue that there was no showing that Fred Stein ever received or concealed or facilitated the transportation of the eight cans of opium. As heretofore indicated, this opium was first discovered by Marguerite Brander on September 8, 1945, in the garage adjacent to the home in which she and Fred Stein were living [R. 136-137]. In the preceding pages we have noted considerable evidence showing guilty knowledge and admissions upon the part of Fred Stein of his possession of opium and his admission of using it.

The testimony indicates that Marguerite Brander concealed these eight cans in three separate packages upon the premises, in three different places, on the day that she and Fred Stein finally parted, namely, September 11, 1945 [R. 151-152, 155-156, and 240].

It is but logical that she concealed them prior to Fred Stein's departure with her clothing. Otherwise, why did he so suddenly depart? The only proper inference that can be drawn is that when Fred Stein noted the disappearance of his eight cans of opium he decided to *get even* with Mrs. Brander by taking her clothes, thereby expecting to cause her to return his opium in return for her clothes.

A. Discussion of Well-settled Rules Governing Appeals.

It is well settled that the sufficiency of the evidence is generally a jury question. Fairly recent cases on this proposition are:

Hamphill v. United States (C. C. A. 9th), 120 F. (2d) 115, cert. den. 314 U. S. 627;

Yoffee v. United States (C. C. A. 1st), 153 F. (2d) 570.

It is also well settled that the fact that the Appellate Court might have reached a different conclusion from that of the jury on certain questions involved will not justify the Appellate Court substituting its views on the weight of the evidence for those of the jury. To this effect:

Jordan v. United States (C. A. D. C.), 87 F. (2d) 64, at p. 67.

It is also established that the Appellate Courts will consider the evidence most favorable to the prosecution and will indulge all reasonable presumption in support of the trial court's rulings and draw all inferences permissible from the record, in determining whether evidence is sufficient to sustain a conviction.

A late case from this Circuit, to such effect, is:

Henderson v. United States (C. C. A. 9th), 143 F. (2d) 681.

IV.

The Court Did Not Err in the Admission of and Exclusion of Evidence in This Case.

A. The Prosecutor Did Not Commit Misconduct.

On page 17 of Appellants' Brief, the contention is urged that misconduct was had on the part of the Government's counsel in the asking of certain questions of the Narcotic Agent Davis. Appellants have also set forth such evidence and proceedings in the footnote.

It is submitted that the questions complained of were merely preliminary questions. They were also asked for the purpose of establishing identity of the defendants. It should be observed that the jury was promptly admonished to disregard the questions and the answers. Even though this type of interrogation might not have been directly to point, the court's admonition to disregard same corrected any possible error. Counsel for appellant did not see fit to submit an instruction upon this point. This preliminary line of interrogation was not prejudicial. No effort was made to bring out any past record upon the part of any of the defendants, nor of their previous connection with narcotics.

Appellants rely upon the cases of *Viereck v. United States,* 318 U. S. 236, and *Berger v. United States,* 295 U. S. 78.

Neither the *Viereck* nor the *Berger* case are to point. Both of these cases chiefly involve repeated and persistent inflammatory *arguments* of a highly prejudicial nature. In the *Viereck* case the closing remarks of the prosecutor were not appropriate to the evidence and they could have only been made to arouse passion and prejudice at a time

when we were then at war. Note page 247 of the *Viereck* opinion.

The *Berger* case, likewise, was an extreme case of improper argument coupled with a most abusive character of interrogations. The court held that the reversal would not have been granted except that the case was otherwise weak. A rereading of both of these cases will clearly show that both the interrogations in the *Berger* case and the caustic arguments in both of these cases are not parallel to the complaint urged in the instant case. The following rule is announced in the *Berger* case:

We quote from page 89:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

In the instant case there was no follow-up by the prosecutor; no complaint is made that his arguments were prejudicial. It is submitted that this is an effort to seize upon a highly technical objection of a slight error, if any, that was cured by the court's admonition; the grasping of a straw, hoping to acquit appellants whose guilt was abundantly established.

The correct law which applies to this alleged misconduct, if any did in fact exist, is the following:

> *Sandquist v. United States* (C. C. A. 10th), 115 F. (2d) 510.

In the *Sandquist* case certain improper questions had been asked which, it was conntended, were improper and

which tended to incite and inflame and prejudice the jury. The court sustained the objections and they were not answered.

The court states, on page 512, as follows:

> "A trial in a court is not a contest between opposing attorneys. It is not a battle of wits. Courts are established to administer the laws of the land fairly and impartially, to the end that justice and right may prevail. To accomplish this, rules of procedure are adopted to guide the court, attorneys, witnesses and the jury. Some transgressions of the rules are bound to occur in the course of a heated trial. It is not every violation of the rules that entitles one to a new trial. Technical violations that do not substantially affect the merits will be disregarded by an appellate court and do not constitute grounds for reversal. It is only when it fairly appears that an error occurring in the trial may have substantially affected the rights of a defendant or contributed to a miscarriage of justice that an appellate court is justified in interposing and ordering a new trial. 28 U. S. C. A. § 391; Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314."

In the *narcotic* case hereinafter noted, questions of rather serious implications were improperly asked; they were objected to and stricken. The court pointed out the admonition by the court to disregard the questions as though they had never been asked, and the court sustaining the other objections cured the prejudicial effect of such questions and the implication therein contained. To this effect:

> *United States v. Ginsberg* (C. C. A. 7th), 96 F. (2d) 882; cert. den. 305 U. S. 620.

In *another* narcotic case hereinunder cited, the court pointed out that it was not prejudicial error or misconduct for the prosecution to lay a foundation for the admission of evidence which is later excluded on objection. This case involved questions pertaining to a spoon, the admission of which was later excluded. To this effect see:

Schmidtberger v. United States (C. C. A. 8th), 129 F. (2d) 390.

It is the general rule, and authorities hereinunder noted support the same, that even the asking of an erroneous question presents no reversible error when the same is objected to and the Trial Court instructs the jury to disregard same. For cases to this effect pertaining to *narcotics,* see the following:

Stahl v. United States (C. C. A. 8th), 144 F. (2d) 909, at pp. 912, 913.

In the *Stahl* case several objectionable questions were asked of the doctor, the defendant, who was charged with a narcotic violation. Objections were promptly sustained and the jury instructed to disregard same. The court held that this was sufficient to cure the error.

In:

United States v. Cohen (C. C. A. 2nd), 124 F. (2d) 164, at p. 167,

—an improper question was asked but it remained unanswered. The judge stated that it had nothing to do with the issues. The Circuit held that such question and another similar line of questioning was not cause for reversal.

Lusco v. United States (C. C. A. 2d), 287 Fed. 69.

In the *Lusco* case questions were asked by the court which carried an implication, but the jury was instructed to disregard any such implication.

A very fair consideration of the subject matter of alleged misconduct is reflected in the Supreme Court opinion of:

United States v. Socony-Vacuum Oil Company, 310 U. S. 151, comm. p. 237.

We particularly call this Court's attention to the language noted on pages 238 and 239; also to page 243:

"As stated in Dunlop v. United States, 165 U. S. 486, 498: 'If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand'."

This Circuit has observed:

McDonough v. United States (C. C. A. 9th), 299 Fed. 30.

"It is only in exceptional instances that each withdrawal does not cure the error."

Dubrin v. United States (C. C. A. 2d), 93 F. (2d) 499, at p. 506.

"The situation in the case at bar is quite different from that in Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. The government's proof there was much weaker, the acts of its counsel were persistently objectionable, and the court failed to exert any such control over the trial as Judge Knox exercised here. *The attempt to turn this trial of men whose guilt was abundantly proved into a trial of*

government's counsel, though a not infrequent expedient of defendants who have no other recourse, ought not, in our opinion, to succeed." (Italics supplied.)

Also note:

United States v. Weiss (C. C. A. 2d), 103 F. (2d) 348, at pp. 354-55;

Pietch v. United States (C. C. A. 10th), 110 F. (2d) 817; cert. den. 310 U. S. 648.

B. Evidence Concerning Prior Relationship With Narcotics and Its Use Was Pertinent and Properly Admitted.

This is in answer to the contentions urged commencing on page 19 of appellants' brief.

The general rule is that evidence of other acts or crimes is not admissible because it is both too remote and too prejudicial.

There are, however, important and well-established exceptions which permit evidence of similar acts for the purpose of showing intent, purpose, design and knowledge, or to rebut the inference of mistake or innocent intent.

The authorities cited hereinunder clearly recognize such exception.

Gianotos v. United States (C. C. A. 9th), 104 F. (2d) 929, at pp. 932, 933.

In the *Gianotos* case, a *narcotic* case, a conviction was had under this same statute. Appellant assigned as error the admission in evidence as to the smuggling of opium by Thomas and appellant some *three* months prior to the commission of the offense set out in the indictment. This

evidence pertained to conversations on the Steamship "Monterey" on a southbound trip to Australia (see page 931 of the above citation).

Appellant argued that evidence of offenses, other than those charged in the indictment, could not be introduced for purpose of proving the charge laid in the indictment. This Circuit Court held to the contrary as follows (page 932):

> "However, there are a number of well-recognized exceptions to the rule excluding evidence of other offenses and these exceptions are founded on as much wisdom and justice as the rule itself. Here we concern ourselves with but one of these exceptions. 'It often happens that two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other, and in such a case, on a prosecution for one, evidence proving it cannot be excluded because it also proves the other.' 16 C. J. § 1134, p. 588."

Page 933:

> "* * * Appellant, thus, by his own acts connected the former crime with this crime which made the testimony admissible for its bearing on the crime under investigation. The applicable rule of law is thus summarized: 'In proving a crime, all the *res geste* may always be shown, though it involve proof or evidence concerning the commission of another and independent crime by the defendant at the same time.' 10 R. C. L. §§ 107-109, p. 940. The admission of this evidence was not error."

More recently, this Circuit held in—

Henderson v. United States (C. C. A. 9th), 143 F. (2d) 681—in substance as follows:

In the *Henderson* case a Chairman of a Rationing Board was charged with unlawfully embezzling certain gasoline ration coupons.

This Court approved the admission of evidence of previous sales and possession of large quantities of gasoline coupons by the defendant on other occasions, although not set forth in the indictment.

On page 683 of the *Henderson* case we see reference to a case which we believe is quite familiar to appellants' counsel, namely, that of *People v. Lisenba*, 14 Cal. (2d) 403, 94 P. (2d) 569, 579-584; aff. 314 U. S. 219 (*Lisenba v. California*).

In the *Lisenba* case the defendant was convicted of the murder of his wife upon whose life he had a large insurance policy. The court permitted evidence showing the death of a previous wife under suspicious circumstances, on whose life the defendant also had a large insurance policy, although many years' intervened between the two deaths.

In the instant case the Government introduced evidence showing the use of a similar product by the defendant Fred Stein, at a period within a short time prior to the date charged [R. 116-117 and 135]. The Government also introduced evidence of conversations showing admissions on the part of Fred Stein, of the use of narcotics [R. 132]. The Government also introduced additional evidence of similar character. This evidence was introduced on the theory that it showed intent, purpose and

knowledge. It is submitted that it is but logical and far more likely that a person who had used and had admitted using such narcotics would have had possession of it as of on or about the date charged. Such evidence was pertinent and proper. It is noted that all of this character of evidence was within three months prior to the specific date charged [R. 116].

Additional cases supporting this principle are the following:

United States v. Cohen (C. C. A. 2d), 124 F. (2d) 164; cert. den. 315 U. S. 811 (Bernstein v. U. S.)

The *Cohen* case was also a *narcotic* case. In it the court allowed proof of the manufacture and sale at a prior time, pointing out that such manufacture and sale necessarily tended to prove possession for the purpose of a later sale under which the defendants were being tried.

Morris v. United States (C. C. A. 5th), 123 F. (2d) 957.

In the *Morris* case, a *narcotic* case, other previous sales of paregoric were allowed to be shown on the question of intent and good faith.

Williams v. United States (C. C. A. 5th), 294 Fed. 682.

The court permitted testimony of the doctor's previous sale of narcotics to an addict, on the issue of knowledge.

For additional cases allowing such evidence for the purpose of showing plan, scheme, design and guilty knowledge, we cite without comment the following:

Tomlinson v. United States (C. C. A., D. C.), 93 F. (2d) 652, 654; cert. den. 303 U. S. 646;

Williamson v. United States, 207 U. S. 425, 450-451;

Tedesco v. United States (C. C. A. 9th), 118 F. (2d) 737, 739-741.

* * * * * * * * *

The exception to the general rule regarding evidence of other offenses also allows the introduction of other acts relied upon to show intent or plan which occurred *after* the acts alleged in the indictment.

Shreve v. United States (C. C. A. 9th), 104 F. (2d) 796, 803, cert. den. 308 U. S. 570;

Morris v. United States (C. C. A. 5th), 112 F. (2d) 522, 528-529, cert. den. 311 U. S. 653.

The last two cases are cited primarily as additional support for the introduction of Government's Exhibit "4," a small bottle containing a liquid that was testified to having been found on September 15, 1945, in the kitchen cabinet of the home whose legal title was jointly held by the witness Mrs. Brander, under the name of Mrs. Fred Stein, and the defendant Fred Stein. This bottle contained a solution of opium, yen she.

C. There Was No Error in the Introduction of Government's Exhibit No. 4, a Small Bottle Containing a Solution of Opium, Yen She.

This bottle was found in the kitchen cabinet of the Dixie Cayon residence on September 15, 1945. The same was found by the witness, Mrs. Brander, when she was accompanied by Narcotic Agents [R. 193 to 196].

There is no dispute, or no evidence to the contrary, of the fact that Mrs. Brander, under the name of Mrs. Stein, held joint title to this property at Dixie Cayon. Even the previous owner so testified [R. 98-99].

There was no unlawful search or seizure involved in Mrs. Brander locating this bottle and contents in the property which title was in her joint name [Government's Exhibit No. 4].

In our opinion a recent case of the Supreme Court, together with the uncontroverted factual matters of this case, clearly show that the obtaining and introduction into evidence of Government's Exhibit No. 4 did not constitute unlawful search or seizure.

See:

George Harris v. United States, dec. by S. Ct. May 5, 1947, 15 L. Wk. 4492, 331 U. S. 145.

Also see:

United States v. Kronenberg (C. C. A. 2d), 134 F. (2d) 483.

It is true that the indictment does not charge the defendants with the possession of this particular small bottle, however, such evidence was admissible on the question of intent and guilty knowledge, as supported by the authorities noted in the previous subheading.

It should not be overlooked that the uncontradicted testimony was to the effect that Fred Stein, in this same home had taken, by teaspoon, a substance which he prepared and which he had kept in a bottle [R. 126]; Fred Stein admitted the taking of opium [R. 132]. There is considerable testimony of a similar nature.

It is true that no evidence was introduced to show Bernard Stein's connection with Government's Exhibit No. 4; however, at time of trial Bernard Stein was represented by a different attorney than he is represented by in this appeal. His attorney at time of trial was content to make no objection to the introduction of Government's Exhibit No. 4 [R. 196].

If the evidence against Bernard Stein was otherwise weak, which it is not, there might be some merit to his present complaint; however, the evidence is strong as to his guilty knowledge with respect to the eight cans of smoking opium, some of which were found in his possession on the date of his arrest.

D. Possession May Be Constructive, It Need Not Necessarily Be Personal or Immediate.

THE EVIDENCE CLEARLY ESTABLISHED GUILTY KNOWLEDGE IN THE POSSESSION OF THE OPIUM INVOLVED.

Appellant argues contrary to the contention set forth in the above subheadings.

It shall be our endeavor to treat appellants' contentions on this and related subjects as a unit.

We refer to Appellants' Opening Brief.

On page 22, with respect to their refused instruction No. 15, again on page 25 with respect to their refused

instructions Nos. 16 and 19, and on page 42 where their refused instruction No. 15 is repeated, and finally on pages 43 and 44 do appellants argue that error was committed with regard to the charge concerning possession of the narcotics.

The refused instruction No. 15 (Appellants' Brief, pp. 22-23 and 42), so far as it sought to charge the jury that the possession "was personal," was erroneous. The latter part of this charge regarding "conscious assertion of possession" was fully covered in other charges to the jury [R. 380-381].

This particular instruction sought to have the jury advised that the possession of the narcotics must be *personal*. Such is not the law.

This instruction (Defendants' Refused No. 15) overlooks two well-settled principles of Federal law. The law provides for constructive possession, and by statute and the numerous cases construing same an "aider or abettor" is equally guilty with a principal (Title 18 U. S. C., Section 550).

The law is well settled that the possession of opium need not be personal or immediate; possession may be constructive.

Narcotic cases definitely establishing the principle that possession may be constructive, and that one who even *facilitates* the possession is equally guilty, are the following:

> *Pon Wing Quong v. United States* (C. C. A. 9th), 111 F. (2d) 751.

In the *Pon Wing Quong* case, this court approved on pp. 757-58, the reading to the jury of the definition as

is reflected in 18 U. S. C., 550, the "aiding and abetting" statute. This court pointed out, on page 756, that the word "facilitate" had the common ordinary definition. The *Pon Wing Quong* case pertained to the fastening of a custom label or "sticker" on a trunk containing opium, for the purpose of preventing inspection of the trunk. Appellant was an employee of the Canadian Express Company. The trunk had been on the ship SS "President Coolidge," which docked in San Francisco, from China. Conviction of violating 21 U. S. C. 174, the same section under which the instant charge was brought, was held to have been established by the above act. This act of attaching the sticker amounted to "facilitation." This court pointed out, on page 758, that by reason of the statute making one guilty of aiding and abetting a crime equally guilty with the principal (18 U. S. C., 550), the appellant was properly found guilty, and stated:

> "Possession of the opium, as that expression is commonly understood, is in neither case a requisite of guilt."

See, also:

Borgfeldt v. United States (C. C. A. 9th), 67 F. (2d) 967.

In the *Borgfeldt* case the court specifically stated that an instruction to the effect that the possession contemplated by the statute must be "personal and exclusive" was *not* correct, and that the Government need not show that the morphine was actually concealed by the defendant (see page 969).

Another *narcotic* case to the same effect:

United States v. Cohen (C. C. A. 2d), 124 F. (2d) 164; cert. den., 315 U. S. 811 (Bernstein v. U. S.).

In the *Cohen* case, four defendants were convicted of concealing and facilitating concealment of morphine. The court stated, on page 165, as follows:

> "The defendants were all convicted upon both counts and each has appealed. Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. United States v. Hodorowicz, 7 Cir., 105 F. 2d 218, 220, certiorari denied, 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; Vilson v. United States, 9 Cir., 61 F. 2d 901."

An additional *narcotic* case is:

Mullaney v. United States (C. C. A. 9th), 82 F. (2d) 638.

In the *Mullaney* case the court, on page 642, discusses a charge with relation to accomplices, and points out that by reason of 18 U. S. C. A., 550, the distinction between principals and accessories has been abolished. On pages 642 and 643, in discussing instructions which are rather similar to the ones given in the instant case, the court pointed out, particularly on page 642, that an instruction requiring that possession must be "personal and exclusive," was not correct.

Additional *narcotic* cases to the same effect are the following:

Rosenberg v. United States (C. C. A. 9th), 13 F. (2d) 369;

Willmering v. United States (C. C. A. 5th), 4 F. (2d) 209;

United States v. Kronenberg (C. C. A. 2d), 134 F. (2d) 483.

We hesitate to repeat the instructions given because we feel we have covered all points urged. It is, however, noteworthy to point out certain of the instructions which specifically advised the jury what they must first find, should they find the defendants guilty. The court gave the correct instruction respecting the possession required [R. 375].

The last three paragraphs reflected on page 379 of the transcript fairly apprised the jury that before the defendants could be found guilty of possession they must have guilty knowledge, and that if the defendants were innocent of the knowledge or contents of the cans, or if there was any reasonable doubt on this proposition, they should be found not guilty.

A similar such charge is to be noted [R. 380], the second paragraph. The court gave the following very proper instructions on the question of guilty knowledge and possession [R. 381]:

> "You are instructed that one of the essential elements (428) of the charge in this case is guilty knowledge of the accused and such guilty knowledge cannot be presumed, but must be proved like the other facts in the case, beyond a reasonable doubt and to

a moral certainty, and unless the Government proves such guilty knowledge beyond a reasonable doubt and to a moral certainty, you must acquit the accused."

"You are instructed that you cannot draw any inferences of possession or concealment of the opium in question merely because of the location where it was found. It is incumbent upon the Government to prove knowledge on the part of the alleged possessor, or you must acquit the accused."

E. There Was No Error in the Instruction Given by the Court With Respect to the Date the Offense Was Alleged to Have Been Committed [R. 374].

On page 29 of Appellants' Opening Brief, they set forth the instruction given by the court with respect to the date charged in the indictment.

A similar such complaint is made on pages 38 and 45, on the contention of the specific date. We shall endeavor to answer all of these contentions under this one subheading.

This instruction, as given, was correct. It points out that the Government is not reqiured to set forth the exact date on which the crime was committed, and concludes: "—at a date reasonably close to the date specifically charged." The general rule involving a crime of this character is that it is sufficient to allege that an offense is committed "on or about" a certain date, or any date so long as it is within the period of limitation. Ordinarily, the precise date is not material so long as the evidence shows that the offense was committed before the finding of the indictment and within the period of limitation. A

variance as to date is ordinarily not fatal. Cases supporting the foregoing are the following:

Hale v. United States (C. C. A. 5th), 149 F. (2d) 401, at p. 403; cert. den., 326 U. S. 732.

In the *Hale* case, pertaining to liquor, the court held that there was no material variance in proving a sale on July 8, under a count charging the doing of business on or about August 8.

Winslett v. United States (C. C. A. 5th), 124 F. (2d) 302.

In the *Winslett* case, the date charged in the indictment was November 2, although most of the evidence referred to acts committed the preceding July. The court held that this was not fatal.

We quote, page 303:

"* * * It has been held too often to require more than a reference to one or two authorities, that the date of an alleged offense as stated in the indictment is not binding so as to limit the proof to that specific date; and that under an allegation like that in the indictment, the proof may fix the offense on any date within the bar of the Statute of Limitations. The evidence was ample to support the conviction."

To the same effect, see the following:

Peterson v. United States (C. C. A. 9th), 4 F. (2d) 702.

In the *Peterson* case, a prosecution for maintaining a common nuisance justified evidence of sales of liquor upon the premises shortly before the date alleged. The court pointed out that the allegation in the indictment of a certain date does not limit proof to that date.

See also:

Weeks v. Zerbst (C. C. A. 10th), 85 F. (2d) 996;
Cornett v. United States (C. C. A. 8th), 7 F. (2d) 531.

F. The Presumption Contained in Section 174, Title 21 U. S. C., Is Not in Violation of the Fifth Amendment to the Constitution.

Appellants raise a similar contention on page 33, and also on page 30, of their Opening Brief. We shall answer these contentions under this one heading. This attack with respect to the explanation required, once possession of narcotics has been shown, as is provided for by statute 21 U. S. C., 174, has frequently but never successfully been sustained by the Federal Courts.

This Circuit has recently decided this same question adverse to appellant's present position.

Gonzales v. United States (C. C. A. 9th), 162 F. (2d) 870 (June 20, 1947).

Page 871:

> "The point was inherent in the case of Yee Hem v. United States, 1925, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904. There the point was approached through a claim that the presumption of guilt, unless possession was explained to the satisfaction of the jury, in effect, made a defendant a witness against himself. The court, 268 U. S. at page 184, 45 S. Ct. at page 471, 69 L. Ed. 904, said: 'The legislative provisions here assailed satisfy * * * requirements in respect of due process. They have been upheld against similar attacks, without exception so far as we are advised, by the lower federal courts. Charley Toy v. United States (2 Cir.), 266 F. 326, 329; Gee Woe v. United States (5 Cir.), 250 F. 428;

Ng Choy Fong v. United States (9 Cir.), 245 F. 305; United States v. Yee Fing, D. C., 222 F. 154; United States v. Ah Hung, D. C., 243 F. 762, 764. We think it is not an illogical inference that opium, found in this country more than four years * * * after its importation had been prohibited, was unlawfully imported. Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is 'so unreasonable as to be a purely arbitrary mandate.' By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress."

In addition to the foregoing, other *narcotic* cases where the same matter has been passed upon adverse to appellant, are the following:

Mullaney v. United States (C. C. A. 9th), 82 F. (2d) 638;

United States v. Moe Liss (C. C. A. 2d), 105 F. (2d) 144;

Copperthwaite v. United States (C. C. A. 6th), 37 F. (2d) 846.

G. A Rejection of Defendants' Instruction No. 16 Was Proper, and Not Error.

On page 43 of Appellants' Brief is the refused instruction No. 16, which argues that the garage in question was open to anyone who chose to enter, and the assertion that the evidence must show that the defendant had personally secreted or transported the specific narcotics. The essential and correct principles embodied in this instruction were adequately covered by other charges given to the jury.

In this connection we refer, also, to page 32 of Appellants' Brief, wherein they quote in part the instruction the court gave on the question of "aiders and abettors."

We design to answer these enumerated points under this one subheading.

On page 32, appellants cite *United States v. Falcone,* 109 F. (2d) 579, also reported in 311 U. S. 205. It is difficult to see the application of the *Falcone* case to the instant case. The *Falcone* case reversed the conviction of one charged with conspiracy that he, as a wholesaler, had supplied sugar yeast and cans out of which alcohol was illicitly distilled. Falcone, as a jobber, sold his sugar to grocers who in turn sold to the distillers. The court held that it must be shown that Falcone either in some sense promoted their venture, or made it his own, or had a stake in its outcome before he could be guilty as a conspirator or an abettor. There was no showing that the jobber promoted or was in any wise connected with the utilization of these legal products in the unlawful distillation carried on by the other conspirators. The *Falcone* case, by comparison, does no more than say that an automobile dealer is not responsible for the acts of a

gangster, merely because he sells him a high-powered car which is later used as a medium of a gangster's unlawful enterprise.

A case more nearly at point on the question of aiding and abetting is the following very recent case.

> *Bozza v. United States*, 330 U. S. 160 (February 1947).

The *Bozza* case was likewise a prosecution brought under the Internal Revenue laws, in connection with the operations of a still. The pertinent portion of the *Bozza* case, so far as it pertains to the "aiding and abetting" statute, is quoted hereinunder:

Page 164:

> "We think there was adequate evidence to support a finding of guilt on the first count which charged operation of the business of distilling to defraud the Government of taxes. There was certainly ample evidence to show that Chirichillo carried on the business of a distiller and that the petitioner helped him to do it. 18 U. S. C. § 550 provides that one who aids and abets another to commit a crime is guilty as a principal. Consequently, the jury had a right to find, as it did, that the petitioner and Chirichillo were equally guilty of operating the business of the distillery. See *United States v. Johnson*, 319 U. S. 503, 515, 518."

On page 32 of Appellant's Brief, they only quote a portion of the court's charge with respect to the subject-matter of "aiding and abetting." The court gave a fairly lengthy and fully explanatory charge upon this principle of law [Note R. 378-379].

The other phase of appellants' complaint closely allied to this point, as treated on page 43 of their brief, was adequately covered by the instructions the court gave. As noted [R. 379], the court charged that where a defendant was innocent of the knowledge of the contents of the cans, or where the jury had reasonable doubt as to whether such knowledge had been proved, such defendant should be found not guilty.

The court also stated as follows [R. 380]:

> "Before a presumption of guilt can arise against Fred Stein in this case, it must be shown by the government that (427) he possessed it or had possessed it, and that he knew of the particular narcotics which were in the cans, in addition to all of the elements concerning which I have heretofore instructed you."

The court again went into this matter [R. 381], and among other things gave the following specific instruction:

> "You are instructed that you cannot draw any inferences of possession or concealment of the opium in question merely because of the location where it was found. It is incumbent upon the Government to prove knowledge on the part of the alleged possessor, or you must acquit the accused."

We have heretofore cited cases brought under this same section, the Jones-Miller Act, wherein the Appellate Courts discussed with approval similar admonitions to the jury in connection with the affirmation of convictions of persons who aided or abetted a violation of the section. For the

sake of brevity we again cite at this point only a few cases:

Pon Wong Quong v. United States (C. C. A. 9th), 111 F. (2d) 751;

United States v. Cohen (C. C. A. 2d), 124 F. (2d) 164; 315 U. S. 811 (Bernstein v. U. S.).

To the same effect:

Borgia v. United States (C. C. A. 9th) 78 F. (2d) 550; cert. den., 296 U. S. 615.

In the last-mentioned case the court, on page 555, discusses with approval the application of 18 U. S. C. A., Section 550, and further states:

> "It is not necessary that an aider or abettor be present at the actual commission of the offense, or know details thereof." (Citing cases.)

Additional discussion of a broad-reaching effect of 18 U. S. C. A., Section 550, with reference to "aiders and abettors," is to be noted in:

United States v. Olweiss (C. C. A. 2d), 138 F. (2d) 798, at p. 800.

> "It was proper to charge them as principals—which they probably were in any event—even though they were only accessories. (§ 550, Title 18, U. S. C. A.): and any evidence admissible against Olweiss was admissible against them, so far as it consisted of conduct in furtherance of the joint venture in which all three were engaged. The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon

the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

H. Defendants' Proposed Instruction No. 22, Dealing With Accomplices, Was Properly Refused.

On page 45 of Appellants' Brief they complain that the court should have specifically stated the witness Brander was an accomplice. Appellants contend that the instruction which the court gave might have been misunderstood and, by some strange reasoning, contend that the jury may have misunderstood the court's instruction to have referred to the testimony of Fred Stein. This argument is hard to follow. Fred Stein elected to avail himself of his constitutional right and did *not* take the stand. In view of this fact, by what stretch of the imagination could the jury have so misunderstood the court's proper and correct instruction on the subject of accomplices?

The court's instruction on "accomplice" is in line with that which has been repeatedly approved by the Appellate Courts. It is to be noted from the transcript [R. 380] that the court pointed out, with reference to an accomplice:

> "* * * that such testimony is to be weighed and scrutinized with great care, and that, if it is not corroborated by other competent evidence, it should not be relied upon * * *."

The court, also, as is reflected in [R. 386] the transcript, gave what may be characterized as the usual and proper instruction concerning the credibility of witnesses. We quote:

> "You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under (434) which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony."

There is no dispute but what a conviction may be sustained upon the uncorroborated testimony of an accomplice. See the following case involving *narcotics*:

> *United States v. Mule* (C. C. A. 2d), 45 F. (2d) 132.

Convictions have been sustained where based chiefly upon the testimony of accomplices. See the *narcotic* case of:

> *Hass v. United States* (C. C. A. 9th), 31 F. (2d) 13; cert. den., 279 U. S. 865.

With reference to the instruction on accomplices and the law pertaining thereto, we feel the following authorities fully support the contention that the court was right

in refusing the charges proposed and in giving the instruction which it did:

The courts, however, have held that even the failure to give such a precautionary instruction with reference to an accomplice is not reversible error. That a refusal to give such an instruction is generally discretionary, is supported by the following:

Pine v. United States (C. C. A. 5th), 135 F. (2d) 353, at p. 355; cert. den., 320 U. S. 740.

The Supreme Court, in affirming an opinion of this Circuit, has held that while it is better practice to give such an instruction, that the refusal is not error.

See:

Caminetti v. United States, 242 U. S. 470, at p. 495 (aff. *Diggs v. United States,* 220 Fed. 545 (C. C. A. 9th)).

That an instruction somewhat similar to the one given by the trial court is all that is required, see the following:

United States v. Schwartz (C. C. A. 2d), 150 F. (2d) 627;

United States v. Schanerman (C. C. A. 3rd), 150 F. (2d) 941;

United States v. Sorcey (C. C. A. 2d), 151 F. (2d) 899.

Upon the proposition that no special instruction need be given when the matter is covered by the general instructions, see:

Grimes v. United States (C. C. A. 5th), 151 F. (2d) 417;

United States v. Schanerman (*supra*).

V.

Discussion of Evidence Copied in Appellants' Brief, Pages 47-49.

1. Discussion of Quoted Evidence, Page 47, to End of Page 49 of Appellants' Brief.

This evidence pertained to a matter previously discussed in Appellants' Brief. It pertains to alleged improper questions or claimed misconduct. These questions were of a preliminary nature, and to establish identity. In most instances where objection was made, the court gave proper admonitions to the jury.

In previous pages of this brief, namely, commencing on page 24 under our heading "A. The Prosecutor Did Not Commit Misconduct," is our answer to these contentions.

2. Discussion of the Evidence Specifically Quoted in Appellants' Brief, Commencing Page 50, to and Including Page 69.

This quoted evidence was that of the witness, Mrs. Marguerite Brander. In the main, this testimony deals with prior possession of opium by the appellant Fred Stein, his use of same, and his admissions and statements regarding opium. This all occurred during the three-month period prior to the final separation.

It would unnecessarily lengthen this brief to again discuss this testimony. It is our opinion that we have fully covered these contentions in previous pages of this brief, namely, commencing on page 29, under our heading "B. Evidence Concerning Prior Relationship With Narcotics and Its Use was Pertinent and Properly Admitted."

3. Contentions Raised by the Quotation of Evidence Reflected on Pages 70 Through 72 of Appellants' Brief.

This quoted evidence refers to Government's Exhibit No. 4, a small bottle containing a solution of opium, or yen she. This subject matter has been fully covered in this brief, commencing on page 34 thereof, under the subheading "C. There was no Error in the Introduction of Government's Exhibit No. 4, a Small Bottle Containing a Solution of Opium, Yen She."

4. Answering the Evidence Quoted on Pages 73 and 74 of Appellants' Opening Brief.

Appellants complain of the court's ruling permitting an explanation by the witness, Mrs. Brander, to the implication raised by questions and other testimony, that she had made a demand for money and specifically for the sum of $5,000. This type of testimony was invited. Appellants saw fit, and probably quite properly so, to introduce in evidence a telegram dated *May 5,* 1945, from witness, Margaret Brander, to Fred Stein [R. 228].

It should be noted that this telegram, by its date, was sent over *four* months prior to the final separation, the final separation taking place September 11, 1945.

The implication sought to be established by this telegram was that Mrs. Brander was either endeavoring to blackmail or was threatening Fred Stein at a previous date, namely May 5, 1945. This was followed by questions implying that she had later asked for $5,000, which she denied [R. 229]. The witness explained the circumstances of her sending the telegram and what had occurred

after its sending, and the fact that she returned and lived with Fred Stein [R. 261].

These implications opened the avenue for the witness to give a further explanation, which she gave.

The witness, Brander, related that subsequent to the sending of this telegram of May 5, 1945, she returned and again lived with Fred Stein, and after that date Fred Stein had entrusted with her a sum of money, namely, approximately $30,000. This money she returned to Fred Stein [R. 364-365]. It is thus apparent that if Mrs. Brander had been making a demand of $5.000, or any such sum, from Fred Stein, that the sting of this insinuation is removed by her later possession of $30,000 of Fred Stein's money which she readily returned to him. Attempt was made to impeach Mrs. Brander, she had a right to explain and give the complete picture. This evidence was invited by the implications cast toward witness Brander.

5. Answering the Evidence Quoted on Pages 75 Through 79, of Appellants' Opening Brief.

This quoted evidence again deals with the subject-matter of alleged improper questions and contended misconduct upon the part of the prosecutor. It should be noted that no complaint has been made that the prosecutor indulged in improper arguments to the jury.

We have heretofore answered these contentions pertaining to misconduct; however, we call attention to certain other matters that are noted in such quoted evidence.

The Narcotic Agent Davis testified that he had been a Narcotic Agent for nine years, having worked in the Southern California area and close to the Border; that he

knew the price being paid for a can of opium in the opium traffic as of the month of September, 1945; thus, his qualifications were abundantly established.

This Narcotic Agent was then permitted to testify that the value of a can of opium at that date would be between $250 and $300. Complaint is made because of these questions and answers.

The court permitted this evidence because of the defense of entrapment. This evidence was also pertinent upon the question of motive. It is submitted that a person would be far more apt to be interested in securing possession of these eight cans of opium, which had such a value, than they would had their value been but slight. It is admitted that value is not a necessary prerequisite, but on the element of motive and intent it was pertinent and proper evidence.

The Narcotic Agent related his qualifications and also that he was familiar with expressions used by people who are trafficking in opium, after which he was permitted to relate names or terms that were generally applied by people who traffic in opium, to smoking opium. He gave in answer such terms as "stuff," "junk," and "hop." R. 352-355.]

It should first be recalled that the witness, Mrs. Brander, testified that Fred Stein had referred to smoking opium as "stuff," or "junk" [R. 142, 155-156], and had also referred to it as "dope" [R. 132]. It is therefore difficult to see where any complaint can be made for

a qualified Narcotic Agent to testify, as an expert, to the names generally applied to smoking opium by those who traffic in it. It would not be expected that such persons would refer to it as smoking opium. Should the jury be kept entirely in the dark?

That such was proper, see the following:

Officers and habitual users of opium have been permitted to express an opinion that a substance found was, in fact, opium.

Ching v. United States (C. C. A. 9th), 264 Fed. 639; cert. den. 254 U. S. 630;

Pennacchio v. United States (C. C. A. 2d), 263 Fed. 66; cert .den. 253 U. S. 497.

Police officers have been permitted to testify as to the meaning of letters and figures on horse-racing scratch sheets.

People v. Newman, 24 A. C. 162, 148 P. (2d) 4.

The *Newman* case pertained to racing forms or scratch sheets bearing symbols which otherwise would be unknown to the jury, but the meaning of which was known to the police officers. The court held that it was proper that such officers, as experts, explain the meaning of such symbols.

This is similar to the instant case where the Narcotic Agent also testifies as an expert in assisting the court and jury.

In the *Ching* case, supra, a federal officer was permitted to express an opinion that the opium found in the defendant's room, in the form of a "card of opium," was in the form it was customarily in, when sold for smoking. In the *Ching* case the officer was also permitted to state that the usual price charged for such a card was $2. Thus *value* was considered to not be prejudical in the *Ching* narcotic case of this Circuit (p. 642 of *Ching* Opinion).

This testimony, with respect to both the value and slang names applied to the opium, all comes under the subject-matter of a person who testifies as an expert who has had a *special knowledge* as to the subject-matter.

It is again illustrated in a marihuana case. See:

Banks v. United States (C. C. A. 9th), 147 F. (2d) 628.

In a *narcotic* case, cited below, the court approved the admission of evidence showing defendant's large bank account, on a charge of unlawfully selling and receiving morphine, to rebut a person's testimony that she was but a housewife, receiving allowances, or was engaged in some other business. The court pointed out that such evidence "* * * had some probative force as tending to show that she was engaged in the illicit traffic in narcotic drugs in which it is common knowledge that the profits are large * * *."

To this effect:

Silverman v. United States (C. C. A. 1st), 59 F. (2d) 636; cert. den. 287 U. S. 640.

Conclusion.

It is respectfully submitted that there was substantial evidence indicating the guilt of the appellants. There was sufficient, in fact considerable, evidence pointing to the guilty knowledge upon the part of both appellants, of the possession of the smoking opium charged in the indictment.

The instructions, when viewed in their entirety, were fair, proper, and in accordance with the law.

In view of the presence of substantial evidence establishing the guilt of the appellants, it is submitted that no errors prejudicial to the appellants were committed in the District Court.

The presumption contained in Section 174 of Title 21, U. S. C., is constitutional.

The issue of entrapment was submitted to the jury upon ample and correct instructions.

In view of the foregoing, it is respectfully submitted that the verdict and judgment as to both of the appellants should be affirmed.

Respectfully submitted,

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